

STATE OF MICHIGAN
COURT OF APPEALS

JERRY RAY DEMOREST,

Plaintiff-Appellee,

v

RONALD R. GOLD and LAW OFFICES OF
RONALD R. GOLD, P.L.L.C.,

Defendants-Appellants,

and

JOSEPH A. CASTEEL and KEVIN J. STONER,

Defendants.

UNPUBLISHED

July 30, 2013

No. 308936

Wayne Circuit Court

LC No. 11-010917-NM

JERRY RAY DEMOREST,

Plaintiff-Appellant,

v

RONALD R. GOLD and LAW OFFICES OF
RONALD R. GOLD, P.L.L.C.,

Defendants-Appellees,

and

JOSEPH A. CASTEEL and KEVIN J. STONER,

Defendants.

No. 309495

Wayne Circuit Court

LC No. 11-010917-NM

Before: BORRELLO, P.J., and JANSEN and M. J. KELLY, JJ.

PER CURIAM.

In Docket No. 308936, defendants Ronald R. Gold and Law Offices of Ronald R. Gold, PLLC, appeal by leave granted the trial court's February 14, 2012 order granting in part and

denying in part plaintiff's motion to amend his complaint and granting summary disposition under MCR 2.116(C)(7) as to plaintiff's legal malpractice claim.¹ In relevant part, the February 14, 2012 order permitted plaintiff to amend his complaint to add a claim of fraudulent misrepresentation, which the Gold defendants now appeal. In Docket No. 309495, plaintiff appeals by delayed leave granted the same February 14, 2012 order, arguing that he should have been allowed to amend his complaint to add a breach of contract claim.² In Docket No. 308936, we affirm the trial court's grant of plaintiff's motion to amend his complaint to add a claim for fraudulent misrepresentation. In Docket No. 309495, we affirm the trial court's denial of plaintiff's motion to amend his complaint to add a breach of contract claim.

I. BASIC FACTS.

In 2008, the prosecutor's office charged plaintiff with multiple counts of first-degree criminal sexual conduct (CSC I). In September of 2008, plaintiff and attorney Gold signed a retainer agreement, whereby Gold's law offices agreed to represent plaintiff in his CSC I case. The retainer agreement stated, in relevant part, that plaintiff agreed to pay "my attorney" a stated fee that was "based not only on the complexity of the case, but also on experience and expertise in handling such matters. This fee . . . commits this office to represent you on a 24/7 basis[.]" The agreement further stated, "My attorney reserves the right to assign any work to be performed to an associate or other attorney" Attorney Joseph Casteel, an associate at Gold's law offices, was initially assigned the case. Casteel left Gold's law offices in January 2009, however, and attorney Kevin J. Stoner was hired to replace him. Stoner represented plaintiff at his February 2009 jury trial, which resulted in plaintiff's conviction of one count of CSC I.

After his conviction, plaintiff obtained new counsel. On February 26, 2009, plaintiff, through his new counsel, moved for a new trial on the basis that his CSC I conviction was against the great weight of the evidence and that he was denied the effective assistance of counsel. On January 7, 2010, the trial court vacated plaintiff's conviction and granted him a new trial on both of the asserted grounds. This Court affirmed the trial court's grant of a new trial on the sole basis of ineffective assistance of counsel. *People v Demorest*, unpublished opinion per curiam of the Court of Appeals, issued May 3, 2011 (Docket No. 296118). The record showed that Stoner failed to adequately investigate plaintiff's case and neglected to introduce key evidence at trial. *Id.* at 4-12. The prosecution thereafter advised the trial court that it would not pursue its case against plaintiff; and the trial court dismissed plaintiff's criminal case with prejudice on July 22, 2011.

On September 8, 2011, plaintiff sued the Gold defendants, Stoner, and Casteel for legal malpractice. The Gold defendants moved for summary disposition under to MCR 2.116(C)(7),

¹ *Demorest v Gold*, unpublished order of the Court of Appeals, entered November 1, 2012 (Docket No. 308936).

² *Demorest v Gold*, unpublished order of the Court of Appeals, entered November 1, 2012 (Docket No. 309495). In that same order, this Court consolidated the appeals "to advance the efficient administration of the appellate process."

asserting that the two-year malpractice statute of limitation, MCL 600.5805(5), barred plaintiff's complaint. Thereafter, plaintiff moved to amend his complaint to add causes of action for breach of contract and fraudulent misrepresentation. The trial court held that the two-year statute of limitations barred plaintiff's legal malpractice claim and granted summary disposition as to that claim. The trial court denied plaintiff's motion to add a claim for breach of contract, finding that the proposed claim was duplicative of plaintiff's untimely malpractice claim. The court, however, granted plaintiff leave to amend his complaint to add a claim of fraudulent misrepresentation, finding that plaintiff's proposed fraud claim was distinct from his legal malpractice claim.

On appeal in docket no. 308936 the Gold defendants argue that plaintiff's proposed claim of fraudulent misrepresentation sounded in legal malpractice and, thus, the trial court erred by granting plaintiff leave to add the claim to his complaint. In docket no. 309495, plaintiff argues that the trial court erred by denying leave to add his proposed breach of contract claim.

II. BREACH OF CONTRACT CLAIM.

DOCKET NO. 309495.

"We review for an abuse of discretion a circuit court's decision to grant or deny leave to amend a pleading; we will only reverse the court's ruling if it occasions an injustice. A court does not abuse its discretion if it selects an outcome falling within the range of reasonable and principled outcomes." *Boylan v Fifty Eight LLC*, 289 Mich App 709, 727; 808 NW2d 277 (2010) (citation omitted). "MCR 2.118(A)(2) provides that leave to amend a pleading 'shall be freely given when justice so requires.' But leave to amend a complaint may be denied for particularized reasons, such as . . . where amendment would be futile." *Miller v Chapman Contracting*, 477 Mich 102, 106; 730 NW2d 462 (2007) (internal quotation omitted). An amendment is futile where the statute of limitations bars the amended complaint. *Id.* at 106.

In deciding which period of limitations controls, we must first determine the true nature of the claim. "The type of interest allegedly harmed is the focal point in determining which limitation period controls." It is well settled that the gravamen of an action is determined by reading the complaint as a whole, and by looking beyond mere procedural labels to determine the exact nature of the claim. [*Adams v Adams*, 276 Mich App 704, 710-711; 742 NW2d 399 (2007) (citations and quotation omitted).]

An attorney may be held liable under a contract theory, but only when it is shown that the attorney breached a "special agreement" rather than a general agreement to provide the requisite skill or legal services. *Brownell v Garber*, 199 Mich App 519, 524-526; 503 NW2d 81 (1993). A "special agreement" is a "contract to perform a specific act," rather than a general agreement "to exercise appropriate legal skill in providing representation in a lawsuit." *Barnard v Dilley*, 134 Mich App 375, 378; 350 NW2d 887 (1984). See also *Brownell*, 199 Mich App at 524-526; *Aldred v O'Hara-Bruce*, 184 Mich App 488, 490-491; 458 NW2d 671 (1990).

In this case, plaintiff's proposed claim for breach of contract did not allege the existence of a "contract to perform a specific act," *Barnard*, 134 Mich App at 378, but rather an agreement

that defendants would utilize their “experience and expertise in handling” CSC I cases and would “also exercise knowledge, skill, ability and care ordinarily possessed and exercised by attorneys in the State of Michigan.” Moreover, in determining “the true nature of” plaintiff’s claim and, thus, the applicable statute of limitations, the “focal point” is “[t]he type of interest allegedly harmed.” *Adams*, 276 Mich App at 710-711. Plaintiff asserted that defendants breached the contract, i.e., the retainer agreement, by failing to defend him “on a 24/7 basis,” failing to exercise “experience and expertise” in CSC I cases, and “failing to provide a good defense . . . and instead misperforming services in the manner set out” under plaintiff’s legal malpractice claim. Thus, the type of interest allegedly harmed was plaintiff’s interest in receiving an effective defense, which is a claim for legal malpractice. *Id.*; *Aldred*, 184 Mich App at 490-491 (“The complaint indicates that defendant was retained not to perform a specific act but to exercise appropriate legal skill in providing legal representation throughout the various stages of the criminal proceedings. . . . Plaintiffs’ complaint as a whole evidences that damages flowed not from defendant’s failure to represent their son, but from her failure to do so adequately. We find that this claim is grounded in malpractice only.”). Therefore, the trial court did not abuse its discretion by denying plaintiff leave to add his proposed breach of contract claim. *Miller*, 477 Mich at 106; *Boylan*, 289 Mich App at 727. We therefore affirm the ruling of the trial court in Docket No. 309495.

III. FRAUDULENT MISREPRESENTATION.

DOCKET NO. 308936.

Defendants allege that the trial court abused its discretion by allowing plaintiff to amend his complaint to allege a claim of fraudulent misrepresentation. In the present case, plaintiff’s proposed amended complaint asserted one count of fraudulent misrepresentation, under which plaintiff alleged that each defendant:

either expressly or impliedly represented to Plaintiff that they were, individually and/or jointly, experienced, competent attorneys generally skilled as criminal defense counsel, defending serious criminal felony charges, and specifically represented that Defendants had experience and expertise in handling criminal sexual conduct-first degree cases, and would do so on a 24/7 basis

Plaintiff further alleged that the above representations were material and false; that each defendant knew or should have known these representations were untrue at the time they were made; that defendants made the representations intentionally or recklessly “with the intent that Plaintiff rely on them[;]” and that plaintiff’s reliance on defendants’ fraudulent misrepresentations caused him injury. At the January 12, 2012 motion hearing, the trial court found that the allegations in plaintiff’s proposed amended complaint “fit all the elements” of fraudulent misrepresentation and granted the proposed amendment.

The elements of a fraud claim are:

(1) that the charged party made a material representation; (2) that it was false; (3) that when he or she made it he or she knew it was false, or made it recklessly,

without any knowledge of its truth and as a positive assertion; (4) that he or she made it with the intention that it should be acted upon by the other party; (5) that the other party acted in reliance upon it; and (6) that the other party thereby suffered injury. [*Novi v Robert Adell Children's Funded Trust*, 473 Mich 242, 254 n 8; 701 NW2d 144 (2005).]

As previously stated in this opinion, we review for an abuse of discretion a circuit court's decision to grant or deny leave to amend a pleading and we will only reverse the court's ruling if it occasions an injustice. *Boylan*, 289 Mich App at 727. "A court does not abuse its discretion if it selects an outcome falling within the range of reasonable and principled outcomes." *Id.* Regarding plaintiff's proposed claim for fraudulent misrepresentation, we have held that:

when a complaint alleges not only malpractice but also all the necessary elements of fraud, the statute of limitations governing fraud actions will apply to the fraud count and, if such count is not barred, the plaintiff may proceed on that count to collect damages proximately caused by the alleged fraud. *Brownell*, 199 Mich App at 533.

Applying the afore-cited deferential abuse of discretion standard to this case, we hold that the trial court did not err in finding that plaintiff's proposed amended complaint met all the necessary elements of fraud on the basis of his general allegations. In his amended complaint, plaintiff asserted that all the defendants knowingly misrepresented to plaintiff that they possessed experience and expertise in handling CSC I cases and that he relied on those misrepresentations to his detriment. Such language was contained in the retainer agreement, which stated in relevant part: "This fee is based not only on the complexity of the case, but also on experience and expertise in handling such matters" See *Novi*, 473 Mich at 254 n 8; *Brownell*, 199 Mich App at 533. Our review of plaintiff's amended complaint and the basis stated by the trial court for its ruling on this issue lead us to conclude that plaintiff's general allegations were sufficient to allow plaintiff to amend his complaint. Contrary to the assertions of defendants on appeal, any pretrial disposition of plaintiff's fraudulent misrepresentation claim would be more appropriate pursuant to a motion for summary disposition under MCR 2.116(C)(10). See *Brownell*, 199 Mich App at 534. In *Brownell*, *id.* at 534-535, this Court denied the defendant's MCR 2.116(C)(7) motion to dismiss the plaintiff's fraud claim on the basis that the complaint alleged all the necessary elements of fraud. Nonetheless, the *Brownell* Court stated,

Nothing in this opinion precludes defendant from testing the factual support of plaintiff's allegations . . . of his fraud count in a motion for summary disposition under . . . (C)(10). Summary disposition of the fraud . . . claims may yet be appropriate if plaintiff cannot plead facts that raise a genuine issue of material fact with respect to the allegations in his fraud count [*Brownell*, 199 Mich App at 534 (citation omitted).]

Affirmed. No party having prevailed, no costs are awarded to any party. MCR 7.219(A).

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Michael J. Kelly